Chicago-Kent Law Review

Volume 44 | Issue 2 Article 8

October 1967

Some Specific Areas of Malpractice

William J. Joost

No Illinois case has yet squarely held that a nurse, employed by a hospital, may become the servant of a physician when assisting him in surgery. Since control has been recognized as the key fact, both in ordinary cases recognizing the "borrowed servant" doctrine, and as dicta in a few malpractice cases, a change in the law may be predicted, at least as to the acts of nurses in the presence of an operating surgeon. The surgeon is in absolute control during an operation. His orders must be precisely carried out, and he may even control the manner in which they are carried out. Balanced against the construction of the surgeon as master are two factors. First, the hospital staff is hired and fired by the hospital. Second, the hospital and not the doctor pays their wages. However, these last two factors are merely elements which tend to show that the surgeon does not exercise control over a hospital nurse. But, in the context of the surgical theater, these factors lose much of their relevance. Regardless of who hires and fires or who pays wages, during the course of an operation it is the word of the operating surgeon that controls the activities of the assisting nurses. This actual control, based on both necessity and custom, results in destroying the usual presumption of control that can be drawn from the fact that it is the hospital that hires, fires, and pays the nurses. For these reasons, a change in the law can be expected should a respondeat superior case reach the appellate courts which involves a nurse who is guilty of negligent conduct during surgery in the presence of the surgeon.

MERRILL C. HOYT

SOME SPECIFIC AREAS OF MALPRACTICE

X-RAYS[1]

Liability for an injury caused by a physician's negligent use of X-rays in treating a malady rests on the same principles of duty and standard of care that exist in any instance of medical malpractice.[2] Briefly, the ordinary and reasonable care of other physicians in the use of X-rays must be followed.

A more controversial area of X-ray negligence cases is that of evidentiary requirements. The method of proof has changed as the scientific undersanding of X-rays has increased.

Originally, when the use of X-ray treatment was thought to be foolproof, res ipsa loquitur was held to be sufficient to establish a cause of action for negligence. In *Holcomb v. Magee*,[3] the plaintiff's case was based on the facts that he had X-ray burns, that the X-ray machine had been in the

1 See Annot. 13 A.L.R. 1414 (1921); supplemented 26 A.L.R. 732 (1923).
2 Simon v. Kaplan, 321 Ill. App. 203, 52 N.E.2d 832 (1st Dist. 1944).
3 217 Ill. App. 272 (2d Dist. 1920).

sole control of the defendant and that the particular machine, if operated with due care, would not cause burns. This evidence was held to establish a prima facie case. Likewise, res ipsa loquitur was relied on in *Johnson v. Marshall.*[4] The court held that the injuries caused by X-ray treatment were within the realm of common knowledge and consequently there was no need for expert witnesses. The fact that an injury had occurred and this was not the ordinary result established a rebuttable presumption of negligence.

Other jurisdictions, at about the same time as the above two cases, were reaching contrary decisions.[5] These courts held that X-ray treatment was not foolproof. Certain variables such as length of treatment, distance between treated area and machine, and current used were held to be questions of medical procedure and, as such, were matters requiring expert testimony.

More recent Illinois cases have followed this reasoning. Expert testimony has been used to establish the physician's negligence, although the use of the doctrine of res ipsa loquitur, in this area, has not been expressly barred. Expert testimony was relied on by the plaintiff in *Merkle v. Kegerreis.*[6] Likewise in *Gorman v. St. Francis Hosp.*,[7] the First District Appellate Court held that expert testimony was necessary to show accepted medical procedure in the use of X-rays.

Thus, the trend is away from the use of res ipsa loquitur and emphasis is being placed on the use of medical and scientific testimony.

Diagnosis

Sims v. Parker[8] was the first case in Illinois that concerned a cause of action for negligent diagnosis. The defendant had diagnosed the existence of a hernia when, in fact, there was none. Testimony showed that the diagnosis of a hernia in people "as fleshy" as the plaintiff was, at best, difficult. The court held that a physician is not liable for a mere mistake in diagnosis. A breach of ordinary care must be shown before the mistake is actionable.

In *McKee v. Allen,*[9] the defendant had diagnosed chronic rheumatism and operated on the plaintiff in consequence of that diagnosis. The plaintiff contended that the proper diagnosis should have been acute rheumatism and, therefore, the proper treatment should have been heat applications. Medical testimony varied as to whether the plaintiff's syndrome indicated chronic or acute rheumatism. Holding for the defendant, the court said that

4 241 Ill. App. 80 (2d Dist. 1926).
5 Stemons v. Turner, 274 Pa. 228, 117 Atl. 922, (1922); Street v. Hodgson, 139 Md. 137, 115 Atl. 27 (1921).
6 350 Ill. App. 103, 112 N.E.2d 175 (2d Dist. 1953).
7 60 Ill. App. 2d 441, 208 N.E.2d 653 (1st Dist. 1965).
8 41 Ill. App. 284 (1st Dist. 1891).
9 94 Ill. App. 147 (1st Dist. 1900).

an error in diagnosis and subsequent treatment based on that diagnosis does not subject a physician to liability unless the error is so gross as to be inconsistent with ordinary and reasonable skill possessed by physicians.

Again, by the way of dicta, in *Kruger v. McCaughey*,[10] the physician's duty was said to be that of ordinary care in making his diagnosis.

The extent of examination that must be used in making a diagnosis in order to comply with the standard of ordinary and reasonable care is shown by the following two cases. The defendant physician in *Connor v. Eddy*[11] had made several X-rays to discover broken bones. Subsequently, another doctor located a fracture that the defendant had missed. In deciding for the defendant, the court stated that the use of more X-rays would have probably disclosed the fracture. However, requiring more X-rays would increase the ordinary standard of care. Expert testimony showed that the procedure followed by the defendant was customary and acceptable medical procedure.

A similar situation occurred in *Weintraub v. Rosen*.[12] The plaintiff had a severe skull fracture and a fracture of the hip. The defendant physician stated that due to the seriousness of the skull fracture, further examination would have been dangerous. The court agreed with the defendant to that extent but said that his failure to notice the hip fracture was negligent, since the plaintiff continued in his care for a period of seven weeks. This subsequent failure to notice the fracture was a breach of ordinary care.

Evidentiary requirements vary according to the factual situation. In general, expert testimony is required to show that a mistaken diagnosis was negligent.[13] Yet, failure to use ordinary diagnostic procedure, such as X-ray, establishes a prima facie case of negligence if the diagnosis is faulty and further injury ensues.[14] It has been held that a cause of action for a negligent diagnosis cannot be established absent expert witnesses.[15]

As in any suit for negligence, the defendant's breach of duty in improperly diagnosing the malady must cause some injury. In *Wade v. Ravenswood Hosp. Ass'n*,[16] a hospital intern allegedly made a faulty provisional diagnosis stating the injury was a concussion, whereas if X-rays and a spinal puncture had been made a cervical fracture and spinal cord injury would have been located. These tests were subsequently made and during the period of these tests no intervening complications had developed.

10 149 Ill. App. 440 (3d Dist. 1909).
11 233 Ill. App. 20 (1st Dist. 1924).
12 93 F.2d 544 (7th Cir. 1937).
13 Wallace v. Yudelson, 244 Ill. App. 320 (1st Dist. 1927).
14 Polionos v. Renner, 190 Ill. App. 416 (3d Dist. 1914 Abstr.). Expert testimony is probably required to show what would be ordinary diagnostic procedure under circumstances.
15 Graham v. St. Lukes Hosp., 46 Ill. App. 2d 147, 196 N.E.2d 355 (1st Dist. 1964).
16 3 Ill. App. 2d 102, 120 N.E.2d 345 (1st Dist. 1954).

The court held that since the two diagnoses were not necessarily inconsistent and since no actual damages could be shown no cause of action existed.

Diligence in Care and Discharge of the Patient[17]

Prematurely discontinuing medical treatment or giving inadequate care is a form of actionable negligence.[18] The physician's discretion alone is not determinative of how many calls should be made to a patient. Testimony concerning the factual situation, which includes the patient's condition, medical history and emotional make-up, in conjunction with expert testimony on medical practice can be used to show that the physician's attendance was negligent.[19]

A doctor in charge of a case has the duty of discharging a patient as soon as possible but he has a corresponding duty to continue treatment as long as sound medical practice dictates.[20]

If a doctor is discharged by a patient, he is not liable for any complications that develop after the discharge. An example of such a situation is *Kendall v. Brown*.[21] The defendant physician had been dismissed by the plaintiff prior to the proper time for extension of a dislocated limb. It was held that the defendant was not liable for shortening of the limb that could have been alleviated by means of proper extension.

Error in Prescriptions

In *Murdock v. Walker*,[22] the defendant doctor improperly wrote a prescription for plaintiff's child. The improperly presecribed drug was poisonous and the child died. The plaintiff went to a different pharmacy than that recommended by the defendant. Testimony showed that it was proper and customary for a druggist to check with the prescribing physician in a situation like this when the prescription was on its face dangerous. Therefore, the druggist was negligent. The court held that the defendant's negligence was not cut off by the intervening negligence of the pharmacist nor was it excused by the fact that the plaintiff went to a different pharmacy than the recommended one.

William J. Joost

17 See Annot. 57 A.L.R.2d 379 (1958) lack of diligence; 57 A.L.R.2d 432 (1958) abandonment.

18 Ritchey v. West, 23 Ill. 385 (1860).

19 Church v. Adler, 350 Ill. App. 471, 113 N.E.2d 327 (3d Dist. 1953).

20 Southern Surety v. Harrisburg Hosp., 253 Ill. App. 458 (4th Dist. 1929).

21 74 Ill. 232 (1874).

22 43 Ill. App. 590 (1st Dist. 1891).